Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-262

In the Matter of:

Implementation of Section 3 of the
Cable Television Consumer Protection
and Competition Act of 1992

Buy-Through Prohibition

REPORT AND ORDER

Adopted: March 11, 1993; Released: April 1, 1993

By the Commission: Commissioner Marshall not participating.

Table of Contents

I. INTRODUCTION

1. On October 5, 1992, the Cable Television Consumer Protection and Competition Act of 1992 ["1992 Cable Act" or "the Act"] became law.[1] Section 3 of the Act, which amends Section 623 of the Communications Act of 1934, generally prohibits cable operators from requiring subscribers to purchase any "tier" of service, other than the basic service tier, "as a condition of access to video programming offered on a per channel or per program basis."[2] This is commonly referred to as the "buy-through" prohibition. In this *Report and Order* we adopt rules (see appendix B) to implement the statutory buy-through restrictions.

2. *Development of Channel Tiering.* "Tiering" of cable television programming services became commonplace in the late 1970s. Tiering involves the packaging and sale of channels of programming for separate or incremental charges. Cable systems that offer their services in tiers generally do so in a cumulative fashion, requiring subscribers to buy-through successive intermediate tiers of services in order to subscribe to each higher tiered service or to a service offered on a per channel or per program basis. Cable system operators generally control access to premium and pay-per-view services by using either addressable or non-addressable technology. Older systems generally use passive traps (frequency selective filters), nonaddressable converters, or nonaddressable converter/descramblers. These methodologies require the installation and removal of physical devices (traps or different converters) at the subscriber's premises in order to add or delete channels or groups of channels. Newer cable systems using addressable technology have the capability to communicate electronically from their headends to those subscribers who have addressable equipment, such as addressable traps or converters. Consequently, cable systems using addressable technology can make available different levels of cable services electronically, often instantaneously, from their headends. Many cable systems employ a hybrid of addressable and nonaddressable technology. Although addressable equipment permits system operators considerable flexibility in the service packages they market, the industry has generally not offered subscribers -- even those with addressable equipment -- the option of purchasing pay or pay-per-view services individually without the basic and intermediate service tiers.

3. *Statutory Requirements.* Section 3 of the 1992 Cable Act, adds a new Section 623(b)(8) to the Communications Act of 1934 which provides as follows:

(8) Buy-through of other tiers prohibited. --

(A) Prohibition.-- A cable operator may not require the subscription to any tier other than the basic service tier required by paragraph (7) as a condition of access to video programming offered on a per channel or per program basis. A cable operator may not discriminate between subscribers to the basic service tier and other subscribers with regard to the rates charged for video programming offered on a per channel or per program basis.

(B) Exception; limitation.-- The prohibition in subparagraph (A) shall not apply to a cable system that, by reason of the lack of addressable converter boxes

[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[2] 47 U.S.C. §543(b)(8).

> or other technological limitations, does not permit the operator to offer programming on a per channel or per program basis in the same manner required by subparagraph (A). This subparagraph shall not be available to any cable operator after --
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> (i) the technology utilized by the cable system is modified or improved in a way that eliminates such technological limitation; or
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> (ii) 10 years after the date of enactment of the Cable Television Consumer Protection and Competition Act of 1992, subject to subparagraph (C).
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> (C) Waiver.--If, in any proceeding initiated at the request of any cable operator, the Commission determines that compliance with the requirements of subparagraph (A) would require the cable operator to increase its rates, the Commission may, to the extent consistent with the public interest, grant such cable operator a waiver from such requirements for such specified period as the Commission determines reasonable and appropriate.

4. Briefly stated, "|t|he purpose of this provision is to increase options for consumers who do not wish to purchase upper cable tiers but who do wish to subscribe to premium or pay-per-view programming."[3] "|G|reater unbundling of offerings leads to more subscriber choice and greater competition among program services. Through unbundling, subscribers have greater assurance that they are choosing only those program services they wish to see and are not paying for programs they do not desire."[4]

5. *Notice of Proposed Rule Making.* We issued the *Notice of Proposed Rule Making* in this proceeding on December 11, 1992, in order to adopt implementing rules and enforcement and waiver standards for the statutory buy-through prohibition.[5] In our *Notice* we sought comments on the current state of the cable industry's ability to comply with the Act, as well as on the technology and expense of various modifications necessary to achieve compliance. This information is particularly relevant to defining those cable systems whose "lack of addressable converter boxes or other technological limitations" do not permit them to offer programming on a per channel or per program basis in the manner that the statute seeks to achieve. We sought comment, too, on the scope of "other technological limitations" that would preclude compliance, and on how to treat systems that are capable of compliance only in part. We stated in the *Notice* our belief that, under the Act, cable systems which were not designed and built with (or upgraded to incorporate) addressable technology are within the scope of the Act's 10-year exemption, and sought comment upon this interpretation. We also sought comment on the nature and scope of modifications of such systems that would allow cable operators to comply with the Act, with regard both to modifications to be made over a long period of time, and also modifications, if any, that are so simple or inexpensive that they can or should be required to be made in accordance with the provisions of the Act.

6. We also sought comment on how to define and determine the occurrence of prohibited "discriminat|ion| between subscribers to the basic service tier and other subscribers with regard to the rates charged for video programming offered on a per channel or per program basis,"[6] and on whether this provision allows pricing schemes such as multiple channel discounts. The *Notice* sought comment on the scope of our waiver authority under the Act, and the need for specific rules to prevent evasions of the buy-through prohibition. Finally, the *Notice* sought comment on how best to accomplish the Act's directive "to reduce the administrative burdens and cost of compliance for cable systems that have 1,000 or fewer subscribers,"[7] when implementing the buy-through provisions.

7. In response to the *Notice*, the Commission received comments from twenty-three parties, and fourteen parties filed reply comments. A list of all commenters is contained in Appendix A.

II. BUY-THROUGH PROHIBITIONS

8. *Basic Statutory Requirement.* The fundamental requirement of the Act is that all systems permit "basic service tier" subscribers[8] to subscribe to video programming offered on a per channel[9] or per program basis without the necessity of subscribing to any intermediate tier of service, unless the systems' "lack of addressable converter boxes or other technological limitations" does not permit them to do so.[10] We stated in the *Notice* our belief that "cable systems which were not designed and built with (or upgraded to incorporate) addressable technology are by definition within the scope of the Act's . . . exemption."[11] We noted, in this regard that the Senate Committee Report

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[3] 138 Cong. Rec. S14608-09 (Sept. 22, 1992) (statement of Senator Inouye).

[4] S. Rep. No. 102, 102d Cong., 2d Sess. 77 (1992).

[5] *Notice of Proposed Rule Making in MM Docket No. 92-262*, 7 FCC Rcd 8672 (1992).

[6] 47 U.S.C.§543(b)(8)(A).

[7] 47 U.S.C. §543(i).

[8] The "basic service tier" definition appearing in 47 U.S.C. § 623(b)(7) is the applicable definition for purposes of this proceeding. The term "basic cable service" set forth in 47 U.S.C. § 523(3); *see also American Civil Liberties Union v. FCC*, 823 F. 2d 1554 (D.C. 1987), is inapplicable in this context. For present purposes, each cable system is intended to have only a single basic service tier. We note that this issue was also raised in our *Notice of Proposed Rule Making in MM Docket No. 92-266*, 8 FCC Rcd 510, 514 (1992). On a separate matter, ENCORE Media and other parties suggest that the Act permits subscribers to purchase programming offered on a per channel or per program basis alone, without subscribing to the basic service tier. This also is a matter under review in *MM Docket No. 92-266*. *Id.* at 513-514, *supra*.

[9] Some "per channel" services, such as Home Box Office, are now being offered on a "multiplexed" basis. That is, the subscriber receives essentially the same programming repeated on several channels on a different time schedule. For rate regulation purposes, Congress has indicated that such multiplexed services are to be treated as if a single channel service were involved. H.R. Rep. No. 628, 102d Cong., 2d Sess. 80 (1992)("The Committee intends for these 'multiplexed' premium services to be exempt from rate regulation to the same extent as traditional single channel premium services when they are offered as a separate tier or as a stand-alone purchase option.") We believe the same treatment is appropriate here.

[10] 47 U.S.C. §543(b)(8)(B).

[11] *Id.* at 8673.

states that "only about one quarter of all cable systems are addressable, having the technology to isolate all channels."[12]

9. The State of New Jersey Office of Cable Television [New Jersey] notes that of 48 cable systems serving the state, 41 utilize addressability to varying extents and should be considered within the scope of the rule. However, other commenters are unanimous in their view that cable systems which are partially addressable are not capable of complying with the buy-through prohibition at this time without large capital expenditures. Nonaddressable trapping technology is still widely used throughout the industry, notes NCTA, and basic-only subscribers cannot be afforded unimpeded access to per channel or per program offerings due to the technological limitations of the traps currently in use, including signal degradation.[13] In addition, as Time Warner Entertainment Company, L.P. [Time Warner] notes, use of nonaddressable trapping technology as a means of accessing per channel or per program offerings is a highly labor- and cost-intensive method, requiring individual service calls, and potentially jeopardizing system security.

10. A major issue in Congress' consideration of the 1992 Cable Act was the cost that would be imposed on operators and subscribers as a consequence of the buy-through prohibition. Initially, there was an interest in providing the public with the additional programming options that this provision would make available as soon as possible. The response from the industry and others, however, was that the costs imposed by immediate compliance would be enormous, that subscription charges would be driven up, and that the natural evolution of cable technology would be frustrated. The compromise reached was to require that the "buy-through" option be made available except by "those systems that, due to technical limitations, could not comply...."[14] A full 10-year transition period was created for those systems unable to comply due to technical limitations. Both the history of Congressional consideration of this provision and the specific words of the statute suggest that it was fully addressable systems that were most specifically focused on as within the mandate for immediate compliance and that it was the costs of adding full addressability that were the principal reason for the 10-year transition.

11. The technological issues and definition of systems able to comply promptly with this requirement, however, appear to be more complicated than either the legislative discussion or our *Notice* in this proceeding anticipated. The Act mandates immediate compliance only by those systems that can do so without system rebuilding or reconfiguration -- that cannot comply "by reason of the lack of addressable converter boxes or other technological limitations" -- and that can do so without the imposition of large costs that would "require the cable operator to increase its rates." Assuming that subscribers selecting the buy-through option can be charged the specific customer premises equipment costs that they cause to be incurred, an issue discussed further below, there appear to be two kinds of operations to which the requirement may reasonably be applied.

12. First, systems that are addressable with respect to all nonbasic services have the capacity to shut off intermediate tiers and offer subscribers the basic service plus pay channel option without additional equipment expense.[15] Immediate compliance by these addressable systems is clearly anticipated.

13. Second, certain systems that control program access with traps have the ability to provide the buy-through option by adding, not adding or removing traps. Although a variety of complicating factors exist, two paradigm configurations illustrate these possibilities, as noted in footnote 13, *supra*. First, the buy-through option can be made available by installing positive traps if a scrambling carrier is used or by removing or not installing negative traps if the pay service to which subscription is sought is within the block of frequencies over which basic service is delivered. Thus, for example, if channels 2 through 13 encompass the basic service tier, all channels are distributed in an unscrambled mode, and a pay service is on channel 6, it is possible to deliver basic service plus the pay service by simply not installing or by removing the negative trap that would normally control access to channel 6. The second paradigm involves a system so configured that the intermediate tier or tiers of service are distributed over a single contiguously located block of channels that may be trapped out in bulk by band pass or band stop filters. Depending to some extent on the number of channels involved and the frequency spectrum they occupy within the cable system, it may be possible with a single block trap to remove the tier (or tiers) of service and so provide subscribers with the option of purchasing the channels that are not deleted by the trap.

14. In order to accommodate these different situations, we will define systems subject to compliance during the 10-year transition period as all systems that:

> have the capacity to offer basic service and all programming distributed on a per channel or per program basis without also providing other intermediate tiers of service either: 1) by controlling subscriber access to nonbasic channels of service through ad-

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[12] S. Rep. No. 102-92, 102d Cong. 2d Sess. (1992) at 77.

[13] A trap is an inexpensive filter designed to remove one or more signals (frequencies), generally located in or near a subscriber's home, used to control the delivery of cable services. The cable industry generally employs three kinds of traps: positive traps, negative traps, and band pass or band stop filters. Positive traps are designed to remove interfering (scrambling) signals inserted at the cable headend that secure the pay channel. Installing a positive trap enables the subscriber to view the channel. Negative traps are designed to remove the actual signals of one or more television channels. Removing the negative trap -- or not installing it -- enables the subscriber to view the channel. Thus, no scrambling signals need be inserted in the system. Band pass or band stop filters are designed either to pass a specific band of frequencies (signals) or block a specific band of frequencies (signals), thus controlling the delivery of a block of video channels to the subscriber. Traps can have a degrading effect on signal quality, limiting their use. *See Report and Order in MM Docket Nos. 91-169 and 85-38*, 7 FCC Rcd 2021, 2027 (1992), *clarified*, 7 FCC Rcd 8676, 8681 (1992).

[14] H.R. Rep. No. 862 ("Conference Report"), 102d Cong., 2d Sess. 64 (1992).

[15] The House Report, in another context, makes reference to systems whose "configuration permits changes in service tier selection to be effected solely by coded entry on a computer terminal or other similarly simple method." H.R. Rep. No. 4850, 102d Cong., 2d Sess. 84 (1992) (discussing downgrading charges). Although this discussion did not involve the buy-through provision it does reflect congressional understanding regarding addressable system technology.

> dressable equipment electronically controlled from a central control point or 2) through the installation, noninstallation, or removal of frequency filters (traps) at the premises of subscribers without other alteration in system configuration or design and without causing degradation in the technical quality of service provided.

15. This definition is, we believe, consistent with the statutory objective of providing consumers with the option of subscribing to basic and pay service without the need to subscribe to intervening service tiers where that can be done without incurring system expenditures that would increase rates and require premature system upgrading. We recognize that certain system configurations may allow the buy-through option to operate only with respect to certain individual pay or pay-per-view channels and that other channels, trapped or controlled in a different fashion, may be unavailable without intermediate tiers. In order to avoid disparity of treatment between the channels involved, we will not regard a system as capable of compliance and thus subject to the buy-through requirement unless access to *all* per channel and per program charge channels can be provided without intermediate tiers. Where access can be provided to some, but not all per channel or per program charge channels without intermediate service tiers, the cable operator may do so on a voluntary basis. Historical distribution patterns, which typically make such an offering easiest to provide for the most popular services, should not raise favoritism concerns. However, parties providing this option on a voluntary basis to less than the full complement of pay services are cautioned to offer the channels in a manner that is not anticompetitive or that evades the intent of the Act or regulations.

16. An additional issue regarding coverage of the buy-through provision concerns whether systems that are capable of compliance only with respect to portions of the geographical area they serve must comply with the requirement, *i.e.*, whether compliance is required after only 10 years or whether compliance to the extent possible is required now. In the *Notice* we sought comment on:

> the types of . . . cable system design which would present such technological limitations. For example, how should the buy-through provisions operate in instances in which only one community among several served by the same cable system has addressable capability, or in which various levels of services are offered to different communities or subscribers within a community?[16]

In response, the National Association of Telecommunications Officers and Advisors, the National League of Cities, the United States Conference of Mayors, and the National Association of Counties [collectively, the Local Governments] urge that hybrid cable systems be required immediately to comply with the prohibition to the extent that such systems can. Other commenters state that such systems should be exempt from compliance.

17. There are likely to be systems that are addressable only in part of the area they serve, either within a franchise area or in some, but not all, of the franchise areas of a technically integrated system. This may result, for example, from a staged reconstruction of portions of a system, the integration of two or more previously separate systems, or because of different technical configurations that relate to franchise requirements. With respect to such operations we see no reason why compliance should not be required as the necessary equipment is put in place and other services are offered using it. Although some commenting parties have suggested that a resulting differential rate structure within a single geographic or franchise area might conflict with provisions of the Act regarding rate uniformity,[17] we believe there is sufficient flexibility in the Act to accommodate compliance with the buy-through requirement.

18. The Act's technological limitations exception to the prohibition ceases to apply after ten years[18] or once the technology utilized by the cable operator's system is improved in a way that eliminates the technological limitation.[19] We sought comment in the *Notice* on the nature and scope of modification of such systems which would allow cable operators to comply with the Act's buy-through provisions, particularly modifications made over a period of time. New Jersey and the Local Governments urge that the prohibition should apply at the time of renewal of a franchise or when a new community unit is constructed. Indeed, the Local Governments maintain that any upgrade should trigger a responsibility to fully upgrade in a manner sufficient to comply with the buy-through requirement. However, Viacom and the Massachusetts Cable Television Commission [Massachusetts] urge that newly-constructed cable systems not be burdened with an immediate compliance requirement.

19. The statute is clear that the buy-through requirement becomes applicable, even within the 10-year period, as systems become capable of compliance. We agree, therefore, with those commenters urging compliance as soon as systems have the necessary technical capacity. However, we find no requirement in the Act forcing upgrades prior to the expiration of the 10-year period chosen by Congress as the exception's duration. This compliance period was specifically enacted to protect cable operators and their subscribers generally against burdensome costs of compliance.[20] Accordingly, we continue to believe that cable systems not designed and built with (or upgraded to incorporate) addressable or other adequate technology, including systems constructed within this 10-year period, are covered by the Act's exemption. The 10-year transition period was apparently adopted at least in part to permit the "natural evolution" of technology. Present addressable sys-

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[16] *Id.* at 8673.

[17] Section 623(h) (47 U.S.C. § 543(h)) provides: "A cable operator shall have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its cable system." Rules to implement this requirement are under consideration in *MM Docket No. 92-266, supra*. In that proceeding we expressed our tentative conclusion "that the statutory requirement of a geographically uniform rate structure does not prohibit establishment of reasonable categories of service with separate rates and terms and conditions of service." *Id.* at 534. We believe that the technological feasibility of complying with the buy through prohibition is such a reasonable category of service.

[18] 47 U.S.C. §543(b)(8)(B)(ii).

[19] 47 U.S.C. §543(b)(8)(B)(i).

[20] *See* 138 Cong. Rec. S14608 (daily ed. Sept. 22, 1992) (remarks of Sen. Inouye).

tems, for example, typically incorporate encryption systems that frustrate the functioning of certain features of home electronic equipment and Congress has directed the Commission to address these equipment problems in Section 17 of the 1992 Cable Act.[21] Forcing the premature upgrading of equipment could interfere with accomplishment of the tasks set forth in Section 17. In addition, applying the requirement in a fashion that converted a nominal upgrade or rebuild into a conversion to full addressability would create a highly undesirable incentive to forgo system improvements.

20. We do not intend through our approach to freeze in place the manner of system operation or the way in which systems are designed or their channels configured. The need to comply with the regulatory policies incorporated in the 1992 Cable Act, including the mandatory signal carriage rules, the rate regulation provisions, and the equipment compatibility requirements, along with the benefits associated with the development of new programming services and potential technological developments, make it highly desirable that systems retain the flexibility to alter their channel configurations and signal access control mechanisms. Thus, we do not intend to mandate the continued use of any particular mode of operation. Indeed, systems are encouraged to continue to experiment and to improve service offerings to assure that they are "consumer friendly." In this regard, we are cognizant of situations where system operators have attempted to use technologies in the past, such as so-called pole line converters or signal interdiction taps, that might have facilitated the buy-through option but which were abandoned when rejected by consumers or found to be technically unsuitable.[22] Thus, while systems that have the capacity to do so must comply with the buy-through requirements, changes made to improve customer service or comply with other regulatory mandates are neither precluded nor discouraged.

21. *Discrimination Between Subscribers.* In addition to the basic buy-through provisions, Section 3 of the 1992 Act prohibits cable operators from "discriminat|ing| between subscribers to the basic service tier and other subscribers with regard to the rates charged for video programming offered on a per channel or per program basis."[23] This provision precludes through the indirect means of pricing what the basic buy-through provision prohibits directly. In our *Notice*, we stated our understanding of this provision as ensuring "that basic tier subscribers who do 'buy-through' are entitled to the same rate structure for those premium or pay-per-view services as subscribers purchasing intermediate services or tiers."[24] Virtually all commenters agree with our interpretation. However, the National Cable Television Association |NCTA| asserts that different rates may not be discriminatory if they are based on differences in costs of transmission. We disagree. The Act bans discrimination specifically based upon actual rates charged, thus precluding basic service tier subscribers from being charged higher rates than intermediate tier subscribers based upon claims of economies of scale.

22. We further sought comment in the *Notice* concerning which discounts and pricing schemes could be permissible under the Act's discrimination ban. Again, virtually all commenters propose a straightforward response with which we are in agreement: that is, discounts and similar pricing differentials are permissible so long as a basic-only subscriber may take advantage of such pricing schemes. So-called "multi-pay" discounts that do not distinguish between basic and upper tier subscribers are permissible. Viacom International, Inc. |Viacom| notes, and we agree, that certain discounts or special pricing offers may be afforded to nonsubscribers as initial inducements to become cable subscribers. Such pricing differentials are not prohibited by the Act.[25] We disagree, however, with Tele-Communications, Inc. |TCI|, which would generally permit discounts and incentives as long as they were found to be "noncoercive." Using pricing which is found to be coercive as the standard for triggering the Act's buy-through prohibitions would embroil the Commission in subjective determinations of coercive behavior on a case-by-case basis. We believe this is not what Congress intended. Rather, Congress adopted an easily applied standard using rates to determine if basic-only subscribers are being discriminated against. We also disagree with Cole, Raywid & Braverman |CRB|, which would permit systems to offer greater installation discounts to subscribers who take more than basic service under the notion that this would allow systems greater cost recovery, while not penalizing a basic-only customer. Rather, CRB argues, such discounts reward customers who take many products. The Act, however, is clear that subscribers that do not take intermediate tiers of service are entitled to the same pay or pay-per-view rates as parties who purchase intermediate tiers. Allowing discounts based on the number of intermediate tiers taken directly contradicts this requirement, and accordingly is not permitted.

23. Those commenters who addressed the issue of whether or not a cable operator may charge basic only subscribers availing themselves of the buy-through option for the converter necessary to enable them to purchase per channel or per program offerings are unanimous in their belief that operators should be permitted to do so. We agree. To prohibit such charges would be discriminatory to subscribers who exercise their choice to obtain only basic service, since their rates would increase if the costs of addressable converters were shared by all subscribers to the systems. Allowing a pass-through of specific equipment costs to the subscriber requesting the service for which the equipment is needed is consistent with the generally ac-

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[21] *See e.g. Notice of Inquiry in ET Docket 93-7*, para. 9 (released January 29, 1993) ("As a result of cable systems' use of these techniques, the manner in which cable service is delivered to subscribers often frustrates the use of special features that make use of multiple program signals. This tends to occur most often where some or all of the cable signals are scrambled or otherwise encrypted and the cable system provides service through a cable terminal device, or 'cable converter,' that provides a single channel of programming to the consumer's equipment." (footnote omitted))

[22] The situation, however, is far from static. We note, for example, recent reports that Cablevision Systems Corp. has purchased $6.5 million of addressable interdiction equipment from Scientific Atlanta for deployment in 40 of its cable systems. *Multichannel News*, Feb. 8, 1993 at p. 2. On the other hand sales of addressable converters by their manufacturer were reported to be off 9 percent between 1991 and 1992 following an 8 percent decline the year before. *Multichannel News*, Feb. 15, 1993, at p. 33.

[23] 47 U.S.C. §543(b)(8)(A).

[24] *Notice* at 8673.

[25] However, such inducements must be reasonable in length so as not to be considered discriminatory.

cepted proposition that a party causing an expense to be incurred should bear that cost and that allocating costs in this fashion is not discriminatory.[26] We ! also agree with InterMedia Partners |InterMedia| that operators need not provide all subscribers with the exact same equipment, so long as they comply with the buy-through prohibition. Indeed, where addressable converters are necessary to exercise the buy-through option these converters need only be provided to those subscribers who request the service that necessitates their use. This, too, is the view of those commenters who address this issue. We see no reason to require subscribers to obtain unnecessary equipment that they do not want.[27]

24. *Waiver of the Buy-Through Prohibition.* The Act provides the Commission with the authority to grant waivers of the buy-through prohibition to the extent consistent with the public interest, if enforcement would cause a cable operator to increase its rates.[28] It also already includes a general waiver or exception to the prohibition for systems that lack the technical capability to comply, obviating the need for individual waivers in such cases during the first ten years after enactment. We sought comments, therefore, on whether or not there would be other circumstances in which a waiver would be necessary and appropriate, either during the Act's initial 10-year period or in the context of requests for extensions of the 10-year period.[29] We also suggested that commenters address whether or not Congress contemplated some minimum effect on rates, under which a waiver would not be appropriate.[30] We sought comment on what regulations or guidelines, if any, we should promulgate at this time for evaluating such waiver requests.[31]

25. Those commenters addressing the question of whether circumstances exist, other than those that impact costs, which warrant waivers, either during or after the 10-year exemption period, focus their comments essentially on cable system size.[32] The Coalition of Small Cable Operators |the Coalition| urges an automatic waiver for any system with fewer than 1000 subscribers at the end of the ten-year exemption. The National Cable Television Cooperative, Inc. |NCTC| suggests a below-5000 subscriber waiver. The Consortium of Small Cable Systems Operators |the Consortium| suggests a below-10,000 subscriber waiver, or -- utilizing a Small Business Administration definition -- a waiver for systems whose annual gross revenues are $7.5 million or under. Massachusetts, however, suggests that it is premature to set other waiver criteria without full and careful reflection. NCTA states that the Commission's waiver authority should be used on a case-by-case basis, as the need arises.

26. That portion of the Act concerning our waiver authority speaks broadly of the need for the Commission to exercise its public interest responsibilities, in the face of a request from any cable operator.[33] Waiver requests relating to two time frames are involved. First, at the end of 10 years, the general exemption expires, raising the possibility of requests from operators for extensions of the compliance date. While parties will need to be making decisions during the 10-year period relating to system construction, we nevertheless agree with those who suggest that it would be premature, at this time, to attempt to establish waiver standards to address extension requests. The pace of technical change in the cable industry suggests to us that any waiver guidelines promulgated at this time would almost surely be obsolete before the end of the 10-year transition period. For example, the current generation of addressable descramblers are, according to commenting parties, entirely incompatible with digital transmissions so that implementation of signal compression with its associated channel capacity expansion will require a new generation of equipment. Second, with respect to waiver requests involving compliance during the 10-year period, no commenter addressed the question of whether Congress contemplated a threshold effect on rates to warrant grant of a waiver pursuant to subsection (b)(8)(C). Thus, while rate effects are clearly an issue warranting consideration in the waiver process, we are in agreement with those parties suggesting that such requests be addressed on a case-by-case basis where the variety of factors specific to an individual situation may be weighed "to the extent consistent with the public interest. . . ."[34]

27. We also referenced in our *Notice* that §623(i) of the Act requires that our regulations be designed in such a way as "to reduce the administrative burdens and cost of compliance for cable systems that have 1,000 or fewer subscribers."[35] We thus sought comment on how best to accomplish this directive. The Coalition, the Consortium, and NCTA suggest that this can best be accomplished by establishing a blanket waiver or exemption from the buy-through prohibition for operators of small systems. Indeed, as noted above, the Consortium would create a complete exemption for systems of up to 10,000 subscribers, while NCTC suggests a 5000-subscriber threshold.

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[26] In accordance with the nondiscrimination requirements, however, the charge should not be more than the charge levied on subscribers to other service tiers. Thus, for example, if the converter fee were normally incorporated in the monthly charge for an expanded tier of service the charge to the party skipping that tier should not be larger. System operators should be prepared to demonstrate that this is in fact the case.

[27] We note that addressable converters interfere with or defeat many of the specialized features on subscriber's television sets or VCRs (*e.g.*, remote control, picture-in-picture, or recording one program while trying to watch another simultaneously).

[28] 47 U.S.C. §543(b)(8)(C).

[29] *Notice* at 8674.

[30] *Id.* at 8673.

[31] *Id.* at 8674.

[32] Prime Cable has suggested in its comments an additional ground for exemption, namely, that the Act's buy-through provisions apply solely in a rate regulated environment. We disagree. Prime argues that such a result is mandated because the buy-through provisions are embedded in that section of the Act addressing rate regulation. Contrary to Prime's contention, Section 643's provisions do not solely apply in the rate regulated environment. The legislative history is clear that the Act's buy-through provisions speak to giving subscribers in general the right to purchase, where possible, only those channels they wish to view. *See* 138 Cong. Rec. S14608-09 (Sept. 22, 1992) and S. Rep. No. 102-92, 102d Cong. 2d Sess. (1992) at 77.

[33] 47 U.S.C. §543(b)(8)(C).

[34] 47 U.S.C. §543(b)(8)(C).

[35] 47 U.S.C. §543(i). *See* 138 Cong. Rec. S14608-09 (September 22, 1992) (statement of Senator Inouye) ("It is my intention that the FCC should take particular account of the problems that small cable systems may have in complying with the anti-buythrough provision.").

28. To the extent full compliance with the buy-through provisions will eventually require complete addressability, it is abundantly clear that small systems, including even some systems with considerably more than 1000 subscribers, would be heavily burdened by this requirement with a likely impact on subscription rates. Several commenters have submitted estimates of the costs which would have to be incurred to upgrade a system to full addressability. CRB, for example, maintains that it would cost $1.2 million to upgrade a 5000-subscriber system including necessary computers, controllers, hardware, service time, and converters. The Coalition maintains that the minimal headend costs alone for a system with 1000 subscribers would be in excess of $25,000. Newhouse suggests a $50,000 headend controller cost, plus $2000 per channel for encoding and $140-200 for each installed addressable converter.

29. Based on these cost estimates, we believe that there may well be a basis for a waiver of some type for smaller systems from the necessity for reconstructing to achieve compliance by the end of the ten-year transition period.[36] This is, however, a matter that we believe is better addressed at a point in time closer to that compliance date. As that date approaches, it should be possible to obtain a much better record as to the costs of compliance and to make a more informed judgment as to what an appropriate small system definition might be. In addition, there may be developments that will facilitate centralized management of the addressing function so that even small systems located considerable distances apart may share a common control facility that will enable such small systems to add addressable features such a pay-per-view programming as well as comply with the buy-through provision. Finally, to the extent that some measure of compliance is feasible short of full addressability and the necessary equipment is actually installed, we see no reason why that measure of compliance should not be mandated at that time.

30. *Evasions of the Buy-Through Prohibition.* We sought comment in the *Notice* concerning whether "there are distinct issues of evasion specific to the 'buy-through' provisions of the Act. . . ."[37] Massachusetts and Cablevision suggest that §623(h) of the Act, which concerns evasions generally, can be utilized to prevent or to redress pricing evasions of the prohibition. Massachusetts also warns that cable operators could seek to reconfigure their service offerings in attempts to evade the prohibition's effect. InterMedia, however, claims that it is a permissible marketing strategy to offer programming once marketed on a per-channel basis as part of a multi-channel tier. Newhouse and Time Warner urge that evasions of the prohibition be narrowly defined. Newhouse would only find an evasion in the deliberate reconfiguring of an addressable system to be incapable of complying with the buy-through prohibition, but it cautions that compliance with franchising or compatibility requirements should not be considered an evasion. Time Warner agrees with Newhouse but also would consider it to be an evasion

> if a cable operator with a system which is not fully addressable throughout the system's service area deliberately stops or substantially delays its schedule of implementing full addressability for the sole reason of avoiding the anti-buy-through prohibition, and contrary to a schedule for deployment of addressability as agreed to in a franchise. . . .

31. Clearly, deliberate reconfiguration of an addressable system in order to preclude compliance with the buy-through prohibition is an evasion of the prohibition. We also note that §623(h) of the Act specifically includes "evasions that result from retiering . . ." as an area of concern.[38] Nevertheless, given all the factors that must be considered in any specific case to determine, for example, whether a particular action is an evasion rather than compliance with another requirement,[39] we find it neither feasible nor desirable to attempt to comprehensively catalogue conduct that might be judged evasive. Generally, however, actions not taken to accomplish legitimate technical or customer service objectives that have the effect or are intended to delay or frustrate compliance with the buy-through requirement are prohibited. We specifically recognize in this regard that the ability of systems to comply may be affected by legitimate changes in system operations that are undertaken to achieve compliance with other federal or local regulatory requirements, to improve the technical quality of service, to reduce costs and rates, or to offer service in a more "consumer friendly" fashion. Although subject to review, such actions are not *per se* prohibited. We are cognizant, too, of the Act's mandate in this area that we "periodically review and revise such standards, guidelines, and procedures,"[40] and we will from time to time do so to make sure that the requirements of the law are not being evaded.

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[36] Our rules and regulations for cable television have regularly sought to reduce burdens and costs of compliance on small systems by establishing a 1000-subscriber threshold for applicability. *E.g.,* 47 C.F.R. §76.67(f) (local sports blackouts); 47 C.F.R. §76.95(a) (network program nonduplication); 47 C.F.R. §76.156(b) (syndicated program exclusivity); 47 C.F.R. §76.305(a)(records maintenance); 47 C.F.R. §76.601(e) (performance tests).

[37] *Id.* at 8674 n.8. Section 623(h) (47 U.S.C. §543(h)) is applicable to the rate provisions of the Act generally and is not limited by its terms to buy-through provisions. It states:

> Within 180 days after the date of enactment of the Cable Television Consumer Protection and Competition Act of 1992, the Commission shall, by regulation, establish standards, guidelines, and procedures to prevent evasions, including evasions that result from retiering, of the requirements of this section and shall, thereafter, periodically review and revise such standards, guidelines, and procedures.

[38] 47 U.S.C. §543(h).

[39] For example, §17 of the Act directs the Commission to issue regulations, within 18 months from the date of enactment of the Act (*i.e.,* by April 5, 1994), on methods of assuring compatibility between consumer electronics equipment (*e.g.,* television and VCRs) and cable systems, consistent with the need to prevent theft of cable service. We recognize that these compatibility requirements might affect certain technical aspects of the Act's buy-through prohibition, as well as a determination of whether a particular action is an evasion.

[40] 47 U.S.C. §543(h).

III. ADMINISTRATIVE MATTERS

Regulatory Flexibility Act Final Analysis.

32. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

Need for and purpose of this action. This action is taken to implement §3(a) of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, relating to prohibitions on buy-through marketing practices. This *Report and Order* prescribes rules to prohibit buy-through requirements, to prohibit discrimination between basic-only and other subscribers, to prohibit evasions of these rules, and to reduce burdens and costs of compliance on small systems.

Summary of issues raised by public comments in response to the initial regulatory flexibility analysis. Commission assessment, and the changes made as a result.

A. *Issues raised.* No issue or concerns were raised in response to the initial regulatory flexibility analysis.

B. *Assessment.* Because there were no comments directed to the initial regulatory flexibility analysis, the Commission views the initial analysis as correct and no additional assessment is necessary.

C. *Changes made as a result of such comments.* None.

Significant alternatives considered and rejected.

The Commission considered all the alternatives presented in the *Notice* and considered all the comments directed to the various issues in the *Notice*. In those cases in which commenters proposed alternatives that were less burdensome on cable operators and which would not detract from Congress' mandate to the Commission to implement the Act, these proposals were adopted.

33. *Effective Date.* The rules adopted herein will become effective on **October 6, 1993** in order that compliance with these requirements may be coordinated with related matters adopted or under review in Docket 92-259 (mandatory broadcast signal carriage and channel position requirements) and Docket 92-266 (rate regulation). Accordingly, IT IS ORDERED that, pursuant to §§4(i), 303(r), and 624(e) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 303(r), and 544(e), Part 76 of the Commission's Rules, 47 C.F.R. Part 76, IS AMENDED as set forth in Appendix B, effective **October 6, 1993.**

34. IT IS FURTHER ORDERED that MM Docket No 92-262 is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Comments

1. Adelphia Communications Corporation, *et. al.*
2. Blade Communications, Inc. *et. al.*
3. Cablevision Systems Corporation
4. Coalition of Small System Operators
5. Cole, Raywid & Braverman
6. Community Antenna Television Association, Inc.
7. Consortium of Small Cable System Operators
8. Continental Cablevision, Inc.
9. Cox Cable Communications
10. Discovery Communications, Inc.
11. Electronic Industries Association Consumer Electronic Group
12. ENCORE Media Corporation
13. InterMedia Partners
14. Massachusetts Cable Television Commission
15. National Association of Telecommunication Officers and Advisors, *et. al.*
16. National Cable Television Association, Inc.
17. National Cable Television Cooperative, Inc.
18. Newhouse Broadcasting Corporation
19. New Jersey Office of Cable Television
20. Tele-Communications, Inc.
21. Time Warner Entertainment Company, L.P.
22. USA Networks and ESPN, Inc.
23. Viacom International, Inc.

Reply Comments

1. Blade Communications, Inc., *et. al.*
2. City of Cincinnati, Ohio
3. Coalition of Small Systems Operators
4. Cole, Raywid & Braverman
5. Community Antenna Television Association, Inc.
6. Continental Cablevision, Inc.
7. ENCORE Media Corporation
8. National Association of Telecommunications Officers and Advisor, *et. al.*
9. National Cable Television Association, Inc.
10. Newhouse Broadcasting Corporation
11. Prime Cable
12. Tele-Communication, Inc.
13. Time Warner Entertainment Company, L.P.
14. Viacom International, Inc.

APPENDIX B

RULES

Part 76 of Chapter I of Title 47 of the Code of Federal Regulation is amended to read as follows:

Part 76 - Cable television service

1. The authority citation for Part 76 is revised to read as follows:

Authority: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085, 1101; 47 U.S.C. §§ 152, 153, 154, 301, 303, 307, 308, 309; Secs. 612, 614-615, 623, 632 as amended, 106 Stat. 1460; 47 U.S.C. §§532, 533, 535, 543, 552

2. Section 76.900 is added to read as follows:

§76.900 Buy-through of Other Tiers Prohibited.

(a) No cable system operator may require the subscription to any tier other than the basic service tier as a condition of subscription to video programming offered on a per channel or per program charge basis.

(b) A cable operator may not discriminate between subscribers to the basic service tier and other subscribers with regard to the rates charged for video programming offered on a per-channel or per-program charge basis.

(c) Prior to October 5, 2002, the provisions of paragraph (a) of this section shall not apply to any cable system that lacks the capacity to offer basic service and all programming distributed on a per channel or per program basis without also providing other intermediate tiers of service:

1) By controlling subscriber access to nonbasic channels of service through addressable equipment electronically controlled from a central control point or

2) Through the installation, noninstallation, or removal of frequency filters (traps) at the premises of subscribers without other alteration in system configuration or design and without causing degradation in the technical quality of service provided.

(d) Any retiering of channels or services that is not undertaken in order to accomplish legitimate regulatory, technical, or customer service objectives and that is intended to frustrate or has the effect of frustrating compliance with paragraphs (a) - (c) of this section is prohibited.